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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1009

WESTERN NATURAL GAS COMPANY, *Petitioner,*

v.

CITIES SERVICE GAS COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Question Presented	3
Statement	4
1. Initial Actions of the Federal Power Commission	4
2. The Section 5(a) Investigation	6
3. The Complaint Before the Commission	6
4. The State Court Suit	8
Reasons for Granting the Writ	10
1. The Decision Conflicts with Federal Power Commission Primary Jurisdiction and the Requirement of Exhaustion of Administrative Remedies.	10
2. The Decision Conflicts With The "Filed Rate" Doctrine Applied Under the Natural Gas Act by lower Federal Courts and the Commission and Sanctions Enforcement of Unfiled Rebate Agreements.	16
Conclusion	
Appendix:	
A. Statutes Involved:	
1. Natural Gas Act:	
Sections 4(c) and 4(d)	1a
Section 5(a)	2a
Section 7(c)	2a
Section 7(e)	4a
B. Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County (1960)	5a
C. Opinion and Judgment of the Supreme Court of Delaware (1964)	14a
D. Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County (1965)	28a
E. Opinion and Judgment of the Supreme Court of Delaware (1966)	36a

TABLE OF AUTHORITIES

Cases

	PAGE
Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959)	19
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 (1966)	11, 15
Cities Service Gas Co., 14 FPC 134 (1955), Aff'd sub nom *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (3rd Cir. 1956), cert. denied, 353 U.S. 923 (1957)	18
Cities Service Gas Co. v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), cert. denied sub nom. *Magnolia Petroleum Co.* v. *United States*, 358 U.S. 837 (1958)	17, 18
Cities Service Gas Co. v. *State Corporation Commission*, 355 U.S. 391 (1958)	7
Deep South Oil Co. of Texas v. *Texas Gas Corp.*, 358 S.W. 2d 641 (Tex. Civ. App. 1962)	13
Far East Conference v. *United States*, 342 U.S. 570 (1952)	11, 15
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	16, 17
Hennigh v. *Western Natural Gas Co.*, No. 2523, pending in District Court, Grant County, Kansas	12
J. M. Huber Corp. v. *Denman*, 367 F. 2d 104 (5th Cir. 1966)	12, 14
Incress S. S. Co. v. *Maritime Workers Union*, 372 U.S. 24 (1963)	11
Landon v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir., 1964), *cert denied*, 381 U.S. 914 (1965)	12, 17
McClellan v. *Montana-Dakota Utilities Co.*, 204 F. 2d 166 (8th Cir. 1953)	17
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951)	10, 17, 20
Northern Natural Gas Co. v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963)	13
Pan American Petroleum Corp., 24 FPC 1051, 1053 (1960)	18

PAGE

Pan American Petroleum Corp. v. *El Paso Natural Gas Co.*, No. 7925 Sup. Ct. of N. Mex. (decided December 27, 1966 and as yet unreported) 13

Pan American Petroleum Corp. v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962) cert. denied, 370 U.S. 937 (1962) 12, 17

Pan American Petroleum Corp. v. *Superior Court of the State of Delaware*, 366 U.S. 656 (1961) 16

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672 (1954) 5

Signal Oil & Gas Co. v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956), cert. denied, 353 U.S. 923 (1957) 17, 18

Superior Oil Co. v. *El Paso Natural Gas Co.*, 377 S.W. 2d 691 (Tex. Civ. App. 1964) 13

Tennessee Gas Transmission Co. v. *Federal Power Commission*, 322 F. 2d 1006 (D.C. Cir. 1963) 18

Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 10, 20

Texas Eastern Transmission Corp. v. *Federal Power Commission*, 357 F. 2d 232 (5th Cir. 1966) 19

Trunkline Gas Co. v. *Superior Oil Co.*, 31 FPC 506 (1964) 14, 17

United States v. *Interstate Commerce Commission*, 337 U.S. 426 (1949) 20

United States v. *Jones*, 336 U.S. 641 (1949) 20

United States v. *Western Pacific RR Co.*, 352 U.S. 59 (1956) 11

Van Lewis v. *Transcontinental Gas Pipe Line Corp.*, 200 F. Supp. 219 (S.D. Tex. 1961) 13

Western Natural Gas Co., 23 FPC 235 (1960); 23 FPC 238 (1959) 6

Weymouth v. *Colorado Interstate Gas Co.*, 367 F. 2d 84 (5th Cir. 1966) 12

Whitney National Bank v. *Bank of New Orleans*, 379 U.S. 411 (1965) 11

Statutes

	Page
Judicial Code, 28 U.S.C. § 1257(3)	2
Natural Gas Act, 52 Stat. 822 (1938), 56 Stat. 84 (1942), 15 U.S.C. § 717, *et seq.*:	
Section 4	3, 5, 7, 10, 17, 18, 19, 20
Section 5	3, 6, 8, 9, 10, 17, 18, 19, 20
Section 7	3, 5, 6, 10, 18, 19, 20
Section 19	6, 18

Rules and Regulations

Federal Power Commission Regulations under the Natural Gas Act, 18 C.F.R.:	
Section 154.94	7
Federal Power Commission Rules of Practice and Procedure, 18 C.F.R:	
Section 1.6(b)	8
Section 1.7(c)	8

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CITIES SERVICE GAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner, Western Natural Gas Company, prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Delaware entered in its Case No. 20, 1966 (and see reference below to prior decisions in the same case).

OPINIONS BELOW

The original opinion of the Superior Court of the State of Delaware In and For New Castle County granting summary judgment to Respondent was rendered May 20, 1960, is unreported, and appears as Appendix B hereto, *infra*, pp. 5a-12a. The opinion of the Supreme Court of Delaware remanding the case for trial on state issues was dated May 21, 1964, is reported at 201 A. 2d 164, and is printed as Appendix C hereto, *infra*, pp. 14a-25a. The subsequent opinion of the Superior Court again granting summary judgment to Respondent was issued December 10, 1965, is unreported, and appears as Appendix D hereto, *infra*, pp. 28a-35a. The opinion of the Delaware Supreme Court affirming

the Superior Court judgment was dated October 12, 1966, is as yet unreported, and is set forth in Appendix E hereto, *infra,* pp. 36a-44a.

JURISDICTION

The opinion of the Supreme Court of Delaware was rendered on October 12, 1966. Petitioner filed a timely Petition for Re-Argument, which was denied on November 1, 1966. The mandate of the Court was issued the same day. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

The issues of Federal Power Commission jurisdiction and Petitioner's rights and immunities under the Natural Gas Act were raised in Petitioner's answer (A-10), its counterclaim (A-15), its cross motion for summary judgment (A-247, A-248), and its original appeal to the Supreme Court of Delaware.[1] The Delaware Supreme Court specifically passed upon these issues. App. C, *infra,* pp. 14a-25a. Petitioner raised the federal issues before this Court in its Petition for a Writ of Certiorari in 1964. However, Respondent argued as its very first point in its Brief in Opposition that the Delaware decision was not final, since the case had been remanded for trial, and this Court denied certiorari. 379 U.S. 905 (1964). Thereafter, Petitioner preserved its federal questions through the second appeal to the Delaware Supreme Court,[2] although that Court, having previously decided these issues, found it unnecessary to pass upon them again. The finality issue thus has now

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[1] Citations are to "Appellant's Appendix" used in the first appeal to the Supreme Court of Delaware, a certified copy of which is filed with the record in this case.

[2] Appellant's Brief before the Supreme Court of Delaware, p. 42 (1966): "The position taken in the prior appeal in this case that the effective filed rate under the Natural Gas Act was 11¢ and that in no case could a contractual rate, differing therefrom, be enforced without prior filing with the Federal Power Commission is here reiterated."

been resolved by the trial court's final judgment and affirmance by the Delaware Supreme Court, so that the federal questions are now ripe for review.[3]

STATUTES INVOLVED

This case involves §§ 4(c), 4(d), 5(a), 7(c), and 7(e) of the Natural Gas Act, 52 Stat. 822, 823, 825 (1938), 56 Stat. 84 (1942), 15 U.S.C. §§ 717c, 717d, 717f(c), and 717f(e). All are set out in Appendix A, *infra*, pp. 1a-4a.

QUESTION PRESENTED

Beginning in 1955 — three years prior to the commencement of any state court action relative to the rates of Western Natural Gas Company involved in this case — the Federal Power Commission began taking a number of specific steps in the exercise of its jurisdiction over these rates under the Natural Gas Act:

(a) The Commission in 1955 accepted for filing under Section 4 of the Act a Western rate schedule specifying the rate of 11 cents per Mcf which was being paid in 1954 to Western by Cities Service Gas Company;

(b) The Commission in 1955 issued to Western a Certificate of Public Convenience and Necessity under Section 7 of the Act after issuing a public notice of hearing thereon stating that the proposed price was 11 cents per Mcf;

(c) The Commission instituted, and in 1960 dismissed, an investigation of Western's rates under Section 5(a) of the Act, using as a basis for dismissal comparisons of Western's revenues and costs reflecting the 11 cents filed rate;

(d) Still prior to any state court action instituted by Cities, the Commission docketed, and still has pending, a

[3] The trial Court stayed execution of the judgment pending disposition of this Petition for a Writ of Certiorari.

complaint filed by Western invoking the Commission's primary jurisdiction and seeking determination of the effective rate after Cities ceased paying the 11 cents rate in 1958 because of Cities' claim that an 8 cents "contract" price applied;

(e) The Commission's staff, as recently as November 8, 1966, has continued to use the 11 cents rate in exhibits in the applicable "area rate" case now in hearing before the Commission.

Despite the above, the Delaware Supreme Court has held in a collateral action to which the Commission was not a party that the Commission does not have primary jurisdiction over the rate controversy between Cities and Western, that an 8 cents "contract" price controls, and that on the basis of state law, Cities is entitled to recover alleged overpayments pursuant to an agreement, not filed with the Commission, for refund of amounts paid at the 11 cents level. The question presented is:

In light of the above facts, (a) whether the Commission, rather than a state court in a collateral action, has primary jurisdiction over a dispute as to the effective rate level under the Natural Gas Act, and (b) whether the Commission established the 11 cents rate as the effective rate and, if so, whether existence of such rate precludes enforcement in a collateral court action of a contract price or unfiled refund agreement differing therefrom.

STATEMENT

1. Initial Actions of the Federal Power Commission.

On November 16, 1954, pursuant to Commission orders following *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), Petitioner, a producer of natural gas, tendered to the Commission (a) its rate schedule covering its sale to Cities Service Gas Company (Cities) from the Hugoton Field, Kansas, being made on the date of the *Phillips* decision (A-100), and (b) its application for a Certificate of Public Convenience and Necessity authorizing continuation of that sale (A-31). The rate schedule included a contract between Petitioner and Cities originally providing a price of 8 cents per thousand cubic feet (Mcf) (A-39), a supplement which did not affect price (A-72), a "minimum price order" of the Kansas Corporation Commission effective since January 1, 1954, requiring a price of 11 cents per Mcf (A-78), and a copy of a billing statement showing that the price being collected at the time of filing was 11 cents per Mcf (A-88).

On January 13, 1955, the Commission formally considered this rate filing as identified on a table setting forth the 11 cents rate (A-196); voted to accept the rate for filing under Section 4 of the Act; and entered this action in its minutes (A-194). Notice of this Commission action was mailed to Petitioner on March 8, 1955 (A-90-92), and a copy thereof was mailed to Cities by Petitioner (A-134).

On August 10, 1955, the Commission caused to be published in the Federal Register a notice of hearing on Petitioner's application for a Certificate under Section 7, announced a hearing on September 7, 1955, and declared: "The price for the gas is stated to be 11¢ per Mcf." (20 Fed. Reg. 5794)

The Notice advised that protests or petitions to intervene might be filed on or before August 25, 1955. None was filed by Cities or by any other person. On September 14, 1955, the Commission issued to Petitioner an unconditioned Certificate under Section 7 of the Act to continue its sale as described in Petitioner's application (A-31).

Cities filed no protest to these actions and sought no appeal therefrom under Section 19(b) of the Act, although Cities had notice of Petitioner's filings through the Federal Register and because of service by Petitioner (A-191-192). Cities also continued to pay the 11 cents rate after these Commission actions.

2. The Section 5(a) Investigation.

On January 26, 1956, the Commission instituted an investigation under Section 5(a) of the Act of all of Petitioner's rates subject to Commission jurisdiction, including the rate for sale to Cities (A-106). Notice of this proceeding was issued, and some 60 interested parties intervened. Cities, however, did not.

After lengthy hearings and upon the record, the Commission, on January 20, 1960, entered its order terminating the Section 5(a) investigation, leaving Petitioner's rates in effect.[4] The termination rested upon the conclusion that Petitioner's revenues were not "unreasonable" or "excessive" when compared to its cost of service.

In turn, this conclusion rested upon the record, including a Commission Staff Exhibit covering "Interstate Rate Schedules Effective During Test Year" which showed, for the sale here involved, the filed rate of 11 cents (11.0011 cents) per Mcf as the effective rate.

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[4] The Commission's order is reported as Western Natural Gas Co., 23 FPC 235 (1960). The Examiner's Decision is reported at 23 FPC 238 (1959).

While the Commission stated that its action was not to be construed as a "determination" as to what Petitioner's "effective legal rates are or have been," the result was to leave unchanged the rates then in effect under Section 4.

3. The Complaint Before the Commission.

Following the rate filing and the issuance of Petitioner's Certificate, payments were made by Cities at the 11 cents rate until the January 20, 1958, decision of this Court declaring the Kansas minimum price order invalid.[5] Neither Petitioner nor the Commission was a party to the suit resulting in that decision, which did not involve the status of the 11 cents rate then on file under the Act. However, on January 29, 1958, Cities notified Petitioner that it was resuming payment at 8 cents per Mcf (A-150). Cities had not sought and did not then or thereafter seek any action by the Commission that would result in placing 8 cents in effect as a rate, or changing the 11 cents rate recognized by the Commission's acceptance for filing of Petitioner's rate schedule and the issuance of Petitioner's Certificate.[6]

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[5] *Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958).

[6] Then, as now, the Commission's Regulations under the Natural Gas Act prohibit a change of effective rate level without Commission action under Section 4:

"154.94 Changes in Rate Schedules

"(a) No change shall be made in any rate, charge or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act in accordance with this section.

"(b) Every (such) change * * * shall be filed with the Commission * * * not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective."

On April 23, 1958, because of Cities' unilateral act, Petitioner filed a complaint with the Commission under Sections 1.6(b) and 1.7(c) of its Rules of Practice and Procedure, alleging that Cities' action was a violation of the Act and seeking action by the Commission, including a determination of the dispute over the rate Cities was legally obligated to pay (A-124).

The Commission docketed the complaint and cited Cities to appear and answer. Cities did so on June 19, 1958 (A-142-149). The Commission thereafter did not proceed to dispose of the complaint, *but continues to retain it on its docket without decision to date.* The Commission continued to recognize Petitioner's 11 cents rate in its subsequent Section 5(a) investigation, *supra,* and as recently as November 8, 1966, the Commission's staff has listed the 11 cents rate as "effective" in exhibits to be used in the Commission decision of the pending "Hugoton-Anadarko Area Rate" proceeding applicable to sales in Kansas.[7]

4. The State Court Suit.

On June 16, 1958, while the Petitioner's complaint and the Commission's Section 5(a) proceeding were pending before the Commission, Cities filed suit against Petitioner in a Superior Court of the State of Delaware seeking recovery of payments made in excess of an 8 cents price from January 1, 1954, through December 22, 1957 (A-4). Cities' complaint asserted a claimed contract price, excess payments allegedly made pursuant to the state order, invalidity of that order, and a right of recovery on the grounds that payments had been made involuntarily and/or that a "contract" for refund existed. The complaint carefully omitted all reference to Commission actions since

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[7] This recognition appears in Commission Docket No. AR64-1, *et al.*, Exhibit Nos. 81-1(A), p. 376, line 43, and 81-1, p. 317.

1954 and made no mention of any possible rights under the Natural Gas Act or pendency before the Commission of Western's complaint involving the same controversy.

Petitioner answered (A-10), urging that jurisdiction over the controversy lay in the Commission because of the Commission's actions, the pending complaint and Section 5(a) proceedings, and the operation of the Natural Gas Act. Petitioner also urged in bar to the asserted claim of overpayment that the filings with, and actions by, the Commission established the legal, effective rate of 11 cents per Mcf under the Act, and that such rate remained effective and binding on the parties. In addition, Petitioner filed a counterclaim seeking recovery of amounts due subsequent to December 22, 1957, at the 11 cents filed rate (A-15).

Both Petitioner and Cities filed motions for summary judgment. On May 24, 1960, the trial court filed its Memorandum of Decision granting Cities' motion for summary judgment and denying Petitioner's motion (App. B, *infra*, pp. 5a-12a).

Each of the federal questions raised by Petitioner was briefed and argued before the trial court (A-255, A-324), which held that the effective rate remained the "contract rate," that the state court had jurisdiction to hear and decide the case, and that under the facts, Cities was entitled to restitution of amounts paid in excess of an 8 cent contract price.

Petitioner appealed to the Supreme Court of the State of Delaware, where each of the federal questions was presented, briefed, and argued, both in original briefs and in Petitions for Re-argument. On May 21, 1964, the Supreme Court of Delaware, after reargument, filed its opinion holding (a) that the various actions by and before the Commission did not preclude hearing, decision, and judgment in the state court; (b) that despite the Commission's actions

under Sections 4, 5(a) and 7 of the Act, the contract price remained "effective" so that Cities had made overpayments; and (c) that issues of fact existed with respect to Cities' right to recover on the theory of restitution. So holding, the Court set aside the trial court's judgment and remanded the case for further proceedings (App. C, *infra*, pp. 14a-25a).

A hearing was then held on the state law questions, and summary judgment was again granted to Cities. The Delaware Supreme Court affirmed on the ground that there was a "contract" for refund and awarded judgment thereon even though no such contract was ever filed with the Federal Power Commission. (App. E, *infra*, pp. 36a-44a). Petitioner specifically preserved its federal questions during its second appeal (*supra*, n. 2), although the Delaware Supreme Court found it unnecessary to pass upon them again. These federal questions are now ripe for review.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the construction of other federal statutes as to the binding effect of filed rates in collateral actions[8] and of primary agency jurisdiction, but the basic questions presented here involving the Natural Gas Act have not been passed upon by this Court.

1. The Decision Conflicts with Federal Power Commission Primary Jurisdiction and the Requirement of Exhaustion of Administrative Remedies.

Regulated companies cannot follow the dictates of two authorities as to past, present or future rates. One forum

[8] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) (Federal Power Act); *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (Interstate Commerce Act), and see n. 15 *infra*.

must yield to the other. Yet under the erroneous holdings below, the state courts are free to proceed as though the Federal Power Commission is without primary jurisdiction and Commission action under the Natural Gas Act is of no legal effect.

The decision below is in direct conflict with the principle of primary agency jurisdiction long established by this Court as applicable in other areas of rate regulation. See *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and *United States* v. *Western Pacific RR Co.*, 352 U.S. 59 (1956).[9] The decision is also in conflict with recent decisions by the Fifth Circuit that where it is even "arguable" that disputed rates are subject to Commission jurisdiction,

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[9] That the primary jurisdiction doctrine is peculiarly applicable where, as here, a court and an administrative body may otherwise render conflicting decisions on matters within the administrative body's jurisdiction was re-emphasized recently in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). In discussing its earlier decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference* v. *United States* 342 U.S. 570 (1952), the Court said: "There was a real risk that the District Court might find that the defendants had implemented unapproved agreements while the Commission might find in some later proceedings that the same activities constituted the implementation of approved agreements. This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination." 383 U.S. at 220.

In *Carnation* the plaintiff attacked certain rate making agreements as *per se* violations of the anti-trust laws, claiming such agreements had not been approved by the Federal Maritime Commission. The defendants countered that the rate making was pursuant to an earlier agreement which had been approved by the Commission. The Court clearly recognized that a primary determination of whether the rates challenged were, in fact, within the approved orders of the Commission must be made by the Commission and that the lower court should have stayed the case pending outcome of the Commission proceedings. See also *Incress S.S. Co.* v. *Maritime Workers Union*, 372 U.S. 24 (1963); *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965).

a trial court must hold its proceedings in abeyance pending recourse to the Commission, through its complaint procedures, for decision upon its jurisdiction and the effect of Commission actions upon the merits of the rate controversy. *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104 (5th Cir. 1966), and *Weymouth* v. *Colorado Interstate Gas Co.*, 367 F. 2d 84 (5th Cir. 1966).

The decision below thus adds to developing confusion in lower federal and state courts as to just which rate controversies are subject to primary Commission jurisdiction and which are within the ambit of federal and state court jurisdiction. On the one hand, the Fifth Circuit has recently followed the principle of *Far East;* on the other, the Delaware courts and others have proceeded to judgment applying state law to resolve disputes over regulated rates.[10] The same question of Commission primary jurisdiction is pending today in numerous state court proceedings involving disputes between regulated producers and royalty owners;[11] has arisen since 1954 in other contexts involving producers'

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[10] Compare the Fifth Circuit opinions above and *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965), and *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962). In *Landon*, the issue of primary jurisdiction, although discussed in the body of the petition, was not raised as one of the questions presented to this Court. In *Pan-American*, the primary jurisdiction doctrine was not even discussed in the petition.

[11] According to a complaint filed at the Commission by Mobil Oil Corporation, there are 284 such suits pending against that company in Kansas alone (FPC Docket No. RI67-114). Petitioner itself is a defendant in a similar action. This is *Hennigh* v. *Western Natural Gas Co.*, No. 2523, District Court, Grant County, Kansas, a class action brought on behalf of a large number of royalty owners.

regulated rates;[12] is subject today to two emergent, conflicting lines of decisions, including that below; and should now be finally resolved by this Court.

In this instance, the controversy between two regulated companies involved a state pricing order and the question of enforceability of an alleged, but unfiled, refund contract, but the question of Commission jurisdiction arises whether the original cause of controversy is a state tax statute, pricing order, or clause in a private contract. By complaint or answer, the legal effect of Commission acts upon rates is drawn into question in these cases, and ultimately the question of primary agency jurisdiction is unavoidable. If the Fifth Circuit is correct that the agency has primary jurisdiction even over "arguable" questions, then this Court should make clear that the same is true where, as here, both parties and the rate in question are regulated, there are numerous past Commission acts relevant to the merits of the controversy, and the dispute has been submitted to the Commission by proper complaint under Commission Rules.

The holding below treats such Commission complaint procedures as irrelevant, and the court thereby disregards applicability of the doctrine of primary agency jurisdiction.

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[12] See, *e.g.*, *Superior Oil Co.* v. *El Paso Natural Gas Co.*, 377 S.W. 2d 691 (Tex. Civ. App. 1964); *Deep South Oil Co. of Texas* v. *Texas Gas Corp.*, 358 S.W. 2d 641 (Tex. Civ. App. 1962); *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Van Lewis* v. *Transcontinental Gas Pipe Line Corp.*, 200 F. Supp. 219 (S.D. Tex. 1961), and *Pan American Petroleum Corp.* v. *El Paso Natural Gas Co.*, No. 7925 Sup. Ct. of N. Mex. (decided December 27, 1966). In the latter case, the New Mexico Supreme Court has held that a state court has jurisdiction in a rate controversy to decide a threshold question involving interpretation of state tax statutes and contracts, but because of the Commission's exclusive jurisdiction under Section 4 over rate changes, the state court cannot enter a "coercive decree to carry" its own "declaratory judgment into effect."

Throughout this case, Petitioner's complaint raising the same issues has been pending before the Commission. The Delaware court, however, misconstrues Commission inaction to date as a "disclaimer" and apparently assumes that even if it so desired, the Commission lawfully could "delegate" its primary jurisdiction over rates and this controversy to state courts. The opposite is true. See *J. M. Huber Corp.* v. *Denman, supra,* 367 F. 2d at 119, where the court said:

> "But Lessee Pipeline (and the FPC memorandum brief) counter with a good deal of force that this nonaction proves little — certainly not in the light of Phillips I which put an end to 26 years of administrative inaction."

Moreover, that there has been no true "disclaimer" is reflected by the Commission order issued February 7, 1962, terminating a "rule-making" proceeding originally instituted to resolve disputes over Kansas rates resulting from Commission acceptance for filing of rates based on the Kansas order (27 FPC 326). There, the Commission said:

> "We believe at this late date a rule-making proceeding would be a cumbersome and inappropriate means by which to *exercise our jurisdiction* over the matters involved herein. *Such matters can more conveniently be decided when properly raised in individual proceedings before us* * * *." [27 FPC 327, emphasis added.]

This statement is an unequivocal recognition of jurisdiction, and a reference to "individual" proceedings before the Commission, such as Petitioner's complaint proceeding, as a proper proceeding for decision of the controversy. The Commission's duty in such complaint proceedings is well established. After the filing of a complaint under the procedures invoked by Petitioner, the Commission exercises its jurisdiction and decides the controversy over the effective rate. See, *e.g., Trunkline Gas Co.* v. *Superior Oil Co.,* 31 FPC 506 (1964).

To our knowledge, no other case has heretofore dealt specifically with the question of jurisdiction over a collateral determination of rate questions *already* pending before the Commission in a complaint proceeding.

Western's position is and has been throughout this protracted litigation that the Commission, and only the Commission, can determine the disputed question as to the effective rate under the Natural Gas Act. Thus, if a state court has jurisdiction at all in a proceeding of this nature, it may exercise that jurisdiction only after the Commission has first determined the disputed question as to the effective rate and established when that rate became effective. As Western told the Delaware Supreme Court in 1963, "* * * the only proper course for this Court to pursue is to dismiss this case or, at the very least, to stay its hand until a decision in G-14958 has been reached by the Commission."[13] Western reiterated the same position in 1966: "We also urge the Court to reconsider its conclusions as to primary jurisdiction * * * and to reverse and remand this case with instructions to the Superior Court to stay further proceedings pending decision by the FPC upon a pending Complaint filed with the FPC by Western."[14]

This case, however, has followed a course which the doctrines of primary jurisdiction and exhaustion of administrative remedies were evolved to prevent. See *Far East Conference* v. *United States*, and *Carnation Co.* v. *Pacific Westbound Conference, supra.* If the Delaware court is correct, the selected forum for the adjudication of rate

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[13] Petition for Re-Argument, No. 58, p. 18 (1962). See also Appellant's Brief before the Supreme Court of Delaware, p. 37 (1962): "The FPC having thus the power and duty to act, and its jurisdiction having attached first over issues peculiarly within its competence involving the public interest, Western submits that the court below erred in failing to stay its hand until the FPC has acted upon Western's pending Complaint."

[14] Petition for Re-Argument, No. 20, pp. 23-24 (1966).

disputes is to be that which, in the plaintiff's view, is most likely to look favorably upon its contentions. Pendency of the same controversy before the Commission has no bearing. And prior Commission acts controlling rates may be deemed irrelevant to enforcement of a contract price and an unfiled rebate agreement as determined by the court. Clearly, this construction by the Delaware courts and other lower courts conflicts with decisions of this Court as to primary agency jurisdiction and with decisions of such lower courts as are applying the principle of *Far East* and similar cases.

2. The Decision Conflicts With The "Filed Rate" Doctrine Applied Under the Natural Gas Act by lower Federal Courts and the Commission and Sanctions Enforcement of Unfiled Rebate Agreements.

Regardless of the jurisdiction of a state court to entertain a complaint, when the court proceeds to adjudicate an "effective" rate and enforce its conclusion, that court is assuming jurisdiction over the rate for all periods involved in the controversy before it. When the court does so collaterally by treating prior Commission action as of no legal effect, that court also is exercising a rate control which is exclusively the Commission's.

This case brings before this Court the substantive issues of the "filed rate" question left unresolved in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware*, 366 U.S. 656 (1961), wherein this Court stated that it was "not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy."

Established principles under the Act have been that effective rates may not be changed retroactively (*Federal*

Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)), and, under some lower federal court and Commission decisions, that the "filed rate" doctrine is applicable, *i.e.*, the specific rate filed with the Commission becomes and remains the *only* legal, binding rate in collateral proceedings until changed by Commission action under Sections 4 or 5.[15]

Adherence to these principles provides stability in rates not possible under the doctrine of the Delaware court's decision. Under that decision, state or federal courts, on determination that a contract price is different from the rate on file with the Commission, may enforce that contract price without any prior filing with or action by the Commission to change the rate so filed. Unfiled refund or rebate agreements calling for repayment of amounts paid pursuant to filed rates thus become enforceable under such decision.

The course followed by Cities here and sanctioned by the Delaware court's decree would by-pass and render meaningless and unnecessary the procedures provided by the Act for court review of Commission action in accepting rates for filing or in granting Certificates permitting service at any given rate.

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[15] See *McClellan* v. *Montana-Dakota Utilities Co.*, 204 F. 2d 166 (8th Cir. 1953); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), cert. denied sub nom. *Magnolia Petroleum Co.* v. *United States*, 358 U.S. 837 (1958); and *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3d Cir. 1956), cert. denied, 353 U.S. 923 (1957), applying the principle set out in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, *supra*. An apparent conflict as to the applicability of the "filed rate" principle under the Natural Gas Act is reflected by collateral decisions in *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, *supra*, relied upon below, and *Landon* v. *Northern Natural Gas Co.*, *supra*. However, the Commission still applies the "filed rate" principle in proceedings before it. See *e.g.*, *Trunkline Gas Co.* v. *Superior Oil Co.*, *supra*.

Section 19(b) of the Act provides the method for review of Commission action in accepting a rate for filing. Under the Commission procedures regarding Certificate applications the proposed rate may be conditioned where appropriate protest is filed. And Commission action in this regard is reviewable under Section 19(b). Cities invoked these procedures in other cases involving the Kansas 11 cents rate.[16] Here, the same procedures were available and required. Cities, however, chose not to avail itself of these required remedies, but "elected" instead to await the outcome of collateral litigation involving a state pricing order, and then to seek still another collateral determination as to a rate inconsistent with Commission actions under Sections 4, 5(a) and 7.

Antecedent contracts underlie most rates filed with the Commission under the Natural Gas Act, and disputes over one clause or another, at any particular time, are legion.[17] If, in disregard of Commission procedures, courts may decide such disputes collaterally and enforce contract price

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[16] In *Cities Service Gas Co.* v. *Federal Power Commission, supra,* Cities protested Commission action in accepting for filing a rate based on the Kansas order, and appealed to the Federal Court after application for rehearing and timely petition for review under Section 19(b). And in *Pan American Petroleum Corp.,* 24 FPC 1051, 1053 (1960) Cities urged the Commission to condition a proposed certificate of public convenience and necessity so as not to give recognition to the 11 cents Kansas rate as effective. See also *Cities Service Gas Co.,* 14 FPC 134 (1955), aff'd sub nom. *Signal Oil & Gas Co.* v. *Federal Power Commission, supra,* and *Tennessee Gas Transmission Co.* v. *Federal Power Commission,* 322 F. 2d 1006 (D.C. Cir. 1963).

[17] The question of the legal effect of Commission action accepting a tendered rate for filing, at issue below, is applicable to a substantial number of all producers' rates on file today. From 1957 to 1965, 6,661 rate increase filings by independent producers were permitted to become effective by Commission acceptance for filing and without suspension. (Thirty-seventh through Forty-fifth Annual Reports of the Federal Power Commission for fiscal years 1957-1965).

provisions as construed by them, the rates become not what the Commission permits to become effective but what the first court to act decides they are. Such collateral determinations then undermine Commission issuance under Section 7 of Certificates with or without rate conditions under the "in-line" pricing doctrine of *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959). Conflicting court and Commission actions also create further confusion as to controlling, effective rates in still other collateral litigation, such as the pending Kansas suit by royalty owners against Western.[18] And, in proceedings before the Commission such as the pending Hugoton-Anadarko Area Rate Case under Sections 4 and 5, all cost and revenue comparisons obviously are subject to substantial change depending upon whether it is correct to use the 11 cents filed rate (as the Commission did in disposing of its Section 5(a) proceeding questioning Petitioner's rates), or the 8 cent price determined by the Delaware courts. Recent Commission attempts to control the disposition of refunds[19] likewise become futile if state courts are free to determine not only the effective rate level, but also the entitlement of one party or another to specific amounts under conflicting state law theories.

The collateral determination thus interjects confusion into the regulatory system, is not dispositive of the controversy as it affects the interests of the Commission and other persons who are not parties, and destroys the certainty

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[18] See n. 11, *supra.* Under the theories adopted by the Delaware courts, Western thus could be required to refund to Cities all amounts collected in excess of 8 cents per Mcf; held liable in Kansas to account to royalty owners on the basis of an 11 cents per Mcf or higher rate; and held in the "area rate" case before the Commission to be entitled to retain as a minimum all amounts collected at rates not exceeding the 11 cents level.

[19] See *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 357 F. 2d 232 (5th Cir. 1966).

intended to flow from Commission actions upon the rate under Sections 7, 4 and 5. The practical effect of the decision below and similar decisions by the Eighth and Tenth Circuits conflicting with the "filed rate" principle[20] thus is far-reaching. If, for example, Cities can prevail in a state court, any buyer claiming to be aggrieved by allegedly illegal rates can do the same. If this is true, the seller can, in turn, seek judgment in a court of its own choosing before or after the filing of such a suit by the buyer. Moreover, while the Delaware court has sanctioned a lesser rate in this case, another court may well sanction higher rates in future cases, such as the pending suits between royalty owners and producers, despite any disposition the Commission may have to the contrary. If this decision is allowed to stand, there may well be three jurisdictions adjudicating rights relative to each and every disputed rate — the Commission, the court chosen by the buyer, and the court chosen by the seller.

This Court has made clear that the "filed rate" principle applies under the Interstate Commerce and Federal Power Acts,[21] and the same must now be said as to the Natural Gas Act. If a court proceeds as the Delaware courts have, a rate previously definite and certain by Commission action under Section 4, recognized by issuance of a Certificate under Section 7, and utilized in testing revenues in a Section 5(a) rate case, is effectively nullified by action outside the Act's procedures and contrary to its design.

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[20] See cases cited in n. 15, *supra*.

[21] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *United States* v. *Jones*, 336 U.S. 641 (1949); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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